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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VIRGIL POPESCU,

Defendant and Appellant.

D053536

(Super. Ct. No. SCD209122)

Appeal from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed in part; reversed in part and remanded for resentencing.

A jury convicted appellant Virgil Popescu of one count of stalking (Pen. Code, § 646.9, subd. (a),¹ count 1), two counts of possession of a deadly weapon (§ 12020, subd. (a)(1), a sawed-off rifle and a billy club in counts 2 and 3, respectively), two counts of possession of a firearm silencer (§ 12520, counts 4 and 5), and possession of an assault weapon (§ 12280, subd. (b), count 6). The court sentenced Popescu to a total term of

¹ All further statutory references are to the Penal Code unless otherwise specified.

three years eight months. On appeal,² Popescu raises challenges to the convictions for stalking and possession of a billy club, and to the sentence.

FACTUAL BACKGROUND

A. Prosecution Evidence

Pagan and Popescu

Robert Pagan was a Parking Enforcement Officer for the City of San Diego and was charged with enforcing the city's parking rules. His responsibilities included ticketing parking offenders. Pagan patrolled an area in east San Diego that included Estrella Avenue and the alley behind it. The alley was the subject of numerous citizen complaints about unlawful parking. Popescu subsequently sent a "John Wayne" postcard to Pagan at Pagan's workplace, initialed by Popescu, stating Pagan was incompetent and ignorant, and that Pagan could continue issuing tickets to Popescu because he would neither move the car nor pay the ticket.

Popescu's Federal Lawsuit

In August 2006, Popescu filed a lawsuit in federal court against Pagan and the City of San Diego. Popescu alleged Pagan had unlawfully targeted Popescu for parking tickets because Popescu had Christian bumper stickers on his car.

In April 2007, in connection with his federal lawsuit, Popescu propounded written interrogatories asking for Pagan's home address and other identifying personal

² Popescu had also petitioned for a writ of habeas corpus. However, because all of his claims in that petition are duplicative of the arguments raised in his direct appeal, we concurrently deny the writ petition.

information, Pagan's religious affiliation, Pagan's political affiliation and how he had voted on the Mount Soledad cross issue. Pagan objected to the questions and declined to give the information. On May 9, 2007, a few weeks after Pagan served his objections to Popescu's discovery, Popescu sent a letter to the deputy city attorney who was defending the federal lawsuit, stating:

"[D]uring the deposition[,] you [Pagan's attorney] asked me to provide my residence address, and I gave you the address. Now, when I asked . . . Pagan to provide his residence address, he, at your [direction], refused to provide the information. How about that? I already know where he lives."

When Pagan saw the letter, he "took it as a threat [against his] family."

Approximately one week later, Popescu sent a letter to the San Diego Police Department accusing Pagan of being a dirty crook and an atheist and of selectively ticketing Popescu's car because the car displayed a Save Our Cross bumper sticker.

The Verbal Threat

In the early afternoon of June 7, 2007, United States Postal Inspectors Villareal and Sprague went to Popescu's apartment.³ Popescu was not in his apartment when Villareal knocked on the door, but as they began to leave Villareal observed him driving into the parking garage. Villareal asked if he was Popescu, and Popescu asked what Villareal wanted. Villareal told Popescu that he was there to help him because he had not been getting his mail. Popescu appeared upset that Villareal had found him and had

³ Villareal and Sprague went to Popescu's apartment because of complaints lodged against Popescu by two local post office employees. Popescu apparently had been involved in heated exchanges with those employees, and they felt threatened by his comments.

come to his apartment without invitation, and remarked that "people [who] come uninvited could get shot." Popescu told Villareal the area was a high-crime neighborhood and that Popescu normally carried a gun after dark when he went to the parking garage. Villareal asked, "Would you shoot me?" and Popescu replied, "You never know," and at the end of their conversation said, "Who knows. I might show up at your front door."

At some point during their conversation, Popescu told Villareal that Pagan had put a parking citation on Popescu's car while he was in his garage looking for things to put in the car. Popescu told Villareal he recognized Pagan's name on the citation because Pagan had previously issued another ticket to him. Popescu told Villareal that, if he "had seen [Pagan] writing that ticket, he would have shot him." Popescu did not seem to be joking during his conversation with Villareal.

Villareal was concerned for Pagan because he interpreted Popescu's comments as a threat to Pagan's safety. Accordingly, Villareal went directly to the nearest police substation to report Popescu's remarks. However, the officers there appeared not to take his report seriously. Accordingly, Villareal called the police dispatcher one or two days later and reported the incident between him and Popescu. Villareal heard nothing further about his report until police contacted him in September 2007.

Shortly after Villareal reported Popescu's remarks, Pagan was working in his patrol area when he received a call from a detective who told him there was a "life threat against [him]" and that Pagan was to stay out of the area between the 4200 and 4400

block of Estrella Avenue until further notice. Pagan, who understood that his life was threatened, took the warning seriously and left the area immediately.

Popescu's Subsequent Conduct

On June 28, 2007, at approximately 3:30 p.m., Popescu went to Pagan's apartment. Pagan was not home, and his wife (Lleana) answered the door. Popescu asked for Pagan by name and wanted to know whether Pagan worked for the City of San Diego. When Lleana stated that Pagan was not home but did work for the City, Popescu asked what time Pagan would be home. When Lleana stated he would not be home until between 6:00 and 6:30 p.m., Popescu said he would be "back later on," turned to leave and began walking away. Lleana, realizing she had not gotten the name of the visitor, called out to Popescu and asked for his name, and Popescu responded "John Roman." A few minutes later, Lleana went outside to collect the mail and saw Popescu standing in front of a grey house near Pagan's apartment. Lleana asked Popescu why he wanted to speak with Pagan, and he responded it was in regard to a donation to the Catholic Church.

Lleana called Pagan and told him of the visitor and asked Pagan if someone was looking for him. Pagan immediately assumed it was Popescu, and gave his description to Lleana. She confirmed that the description matched the visitor, and Pagan then told Lleana about Popescu and his lawsuit. She became frightened when she learned about Popescu. Lleana contacted police because she did not feel safe, and Pagan contacted his captain and reported that Popescu had come to his home. When Lleana spoke with the detective who responded to her call, she informed the detective that she recalled seeing

Popescu in front of her home a few days earlier. Lleana had seen Popescu walking down their street looking around as though he was looking at address numbers.

Shortly after Popescu's visit to their apartment, the Pagans began receiving a magazine called "Southern Cross," a Catholic magazine to which they had not subscribed. A copy of a subscription coupon to the magazine in Pagan's name was later seized from Popescu's apartment. Pagan later received a postcard from Popescu, dated September 12, 2007, and addressed to Pagan at his home address, which said, "Happy Rosh Hashanah. To let you know that I miss you, and every time I see a parking enforcement officer, I think of you. I would like to see you back in the City Heights area." Pagan, as well as his wife, felt threatened by Popescu's conduct as a whole.

The Search

On September 17, 2007, police went to Popescu's apartment to conduct a search. They seized numerous items from his home, garage and cars, including the subscription card to Southern Cross, the hat Popescu had been wearing when he visited Pagan's apartment, and an arsenal of weapons. Among the weapons seized was an expandable metal baton normally used by law enforcement and military personnel as an "impact weapon" (count 3).⁴

⁴ The weapons also included a Tec-22 semi-automatic rifle with a high capacity magazine (count 6) that an expert stated had numerous traits of an assault weapon, two tubular devices with threaded ends that matched the threads on the assault rifle (counts 4 and 5) that an expert stated could be used to silence the report of a fired weapon, and a sawed-off rifle (count 2) that an expert stated was not in its original condition but was shortened to make it readily concealable.

B. Defense Evidence

Popescu testified to a background of hardship, persecution and personal loss. Over the course of his life, he developed a life-long fascination with firearms. He kept the weapons for personal protection because he lived in a rough neighborhood. He purchased the sawed-off rifle in its sawed-off condition, and bought the assault rifle at a local gun store. He did not build the tubular devices for the purpose of being silencers, but built them for other purposes, and the threading coincidentally matched the threading on the TEC-22.

Popescu admitted he went to Pagan's apartment on June 28, 2007, but claimed Lleana was incorrect about the prior time she testified to having seen Popescu in her neighborhood. He explained he visited their apartment only to verify Pagan's home address as part of Popescu's federal lawsuit, and had obtained the address by searching the public records, which gave him three addresses for a Robert Pagan. Popescu admitted he sent the Southern Cross magazine to Pagan, but did so to test his suspicion that Pagan was an atheist who had targeted Popescu's car because of Popescu's Christian bumper stickers, and also because Popescu wanted to convert Pagan to Catholicism. The other correspondence Popescu sent to Pagan's work and home was because he believed Pagan was an atheist and "also a Jew," but were sent as "friendly" gestures.

Popescu denied threatening Pagan or agent Villareal when Popescu spoke with Villareal. He only told Villareal that, because Villareal looked like a thug, he could get shot by someone if he showed up unannounced in the rough neighborhood where

Popescu lived. Popescu did not say he would shoot Pagan, but only said he would "not be surprised" if someone shot him. Numerous character witnesses testified to Popescu's excellent character.

ANALYSIS OF CHALLENGES TO STALKING CONVICTION

Popescu raises several arguments attacking his conviction on count 1 for stalking. He argues the stalking conviction must be reversed because (1) the evidence is insufficient to support the conviction, (2) the court erred by not sua sponte modifying the instructions to identify Pagan as the target of Popescu's alleged stalking, (3) the court erred by not sua sponte giving a unanimity instruction on the stalking offense, and (2) the court erroneously rejected Popescu's pinpoint instruction defining "threat" within the stalking instructions.

A. The Stalking Offense

Section 646.9, subdivision (a), provides that "[a]ny person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking" Section 649, subdivision (e) provides that, "[f]or the purposes of this section, 'harasses' means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose," and subdivision (f) provides that, "[f]or the purposes of this section, 'course of conduct' means two or more acts occurring over a period of time,

however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of 'course of conduct.' " Finally, subdivision (g) provides that, "[f]or the purposes of this section, 'credible threat' means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. . . . Constitutionally protected activity is not included within the meaning of 'credible threat.' "

Thus, to prove the crime of stalking, the People must demonstrate that the defendant (1) followed or harassed another person; (2) made a credible threat; and (3) intended to place the victim in reasonable fear for her safety. (See *People v. Uecker* (2009) 172 Cal.App.4th 583, 593 [summarizing elements of the offense of stalking under § 646.9, subd. (a)]).

B. Standard of Review

In reviewing the sufficiency of the evidence to support a conviction, we determine " 'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.' "

[Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 139, fn. 13.) Under that standard, we review the facts adduced at trial as a whole and most favorably to the judgment, drawing all inferences in support of the judgment to determine whether there is substantial direct or circumstantial evidence the defendant committed the charged crime. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of credible and solid value, supports the jury's conclusions. (*People v. Arcega* (1982) 32 Cal.3d 504, 518.) In making the determination, we do not reweigh the evidence, but instead consider whether " 'any rational trier of fact could have found the essential elements of the [charged offense] beyond a reasonable doubt.' " [Citations.]" (*People v. Rich* (1988) 45 Cal.3d 1036, 1081.)

However, " '[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact.' [Citation.] 'To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence.' [Citation.] [A court is obligated to reverse when] [t]he case . . . is so fraught with uncertainty as to preclude a confident determination of guilt beyond a reasonable doubt." (*People v. Reyes* (1974) 12 Cal.3d 486, 500.)

C. Evidence of Stalking

We conclude there was insufficient evidence from which a rational trier of fact could have concluded that an essential element of the section 646.9, subdivision (a), offense--that Popescu made a "credible threat with the intent to place [Pagan] in reasonable fear for his . . . safety"--was shown beyond a reasonable doubt. Under section 646.9, the credible threat can occur when (1) the defendant issues the threat verbally or in writing intending to induce the victim to fear for his or her safety, or (2) the defendant engages in a pattern of conduct impliedly threatening the victim with the intent to induce the victim to fear for his or her safety, or (3) a combination of words and actions by the defendant are committed (with the intent to induce the victim to fear for his or her safety) that impliedly threatens the victim. (*Id.* at subd. (g).) Evidence supporting the credible threat element appears to consist of two groups: (a) the express verbal threat made to Villareal, and (b) Popescu's conduct toward Pagan.

Statement to Villareal

The principal evidence that Popescu threatened Pagan with the requisite intent of causing Pagan to fear for his safety was Popescu's June 2007 statement to Postal Inspector Villareal. However, we are convinced this evidence is insufficient to establish the threat element of stalking. The requisite express threat element cannot be satisfied merely by showing the defendant made a threatening statement *about* a victim *to a third person*, because a statement *not* targeted at the victim cannot have been "made with the intent to place the person that is the target of the threat in reasonable fear for his or her

safety." Although there is no controlling authority decided under section 646.9, the courts have evaluated analogous statutes and concluded a defendant may be found guilty of issuing a criminal threat based on his or her threatening statements made to a third person only if there is at least some evidence the defendant *intended* the third person to relay the threatening words to the victim to accomplish the defendant's goal of instilling fear in the victim. In *In re David L.* (1991) 234 Cal.App.3d 1655, the court recognized that a person violated the criminal threat statute (§ 422) only when he issued the threat with the specific intent that it be taken as a threat. Moreover, the court noted "[s]ection 422 does not in terms apply only to threats made by the threatener personally to the victim nor is such a limitation reasonably inferable from its language. The kind of threat contemplated by section 422 may as readily be conveyed by the threatener through a third party as personally to the intended victim. *Where the threat is conveyed through a third party intermediary, the specific intent element of the statute is implicated. Thus, if the threatener intended the threat to be taken seriously by the victim, he must necessarily have intended it to be conveyed.*" (*Id.* at p. 1659, italics added.)

When there is *no* evidence the defendant necessarily intended his or her statement to be conveyed by the third person to the target, the courts have found the evidence insufficient to support a finding of the requisite intent. For example, in *People v. Felix* (2001) 92 Cal.App.4th 905 (*Felix*), the defendant was convicted of violating section 422 based on his statement to a psychologist during a therapy session that if the defendant saw his former girlfriend with somebody else, he would shoot her. The psychologist

called the girlfriend and, although the contents of the call were not revealed, the girlfriend reacted to the call by expressing fear for her safety. (*Id.* at pp. 909, 912-913.) The *Felix* court, after questioning whether the absence of any evidence of what the victim was told by the third person would alone bar conviction, stated that even if the content of the relayed statement had been introduced, "*the prosecution still had to prove another element*" (*id.* at p. 913, italics added), specifically, that the defendant had intended his statement to the psychologist instill fear in the target. (*Ibid.*) The *Felix* court, after noting section 422 "was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others [citation] [and] '[o]ne may, in private, curse one's enemies, pummel pillows, and shout revenge for real or imagined wrongs-safe from section 422 sanction' [quoting *People v. Teal* (1998) 61 Cal.App.4th 277, 281]" (*Felix*, at p. 913), concluded the evidence of the circumstances under which the threatening statement was uttered was insufficient to support an inference that the defendant intended the third party to relay the threat. (*Ibid.* ["there [was] no evidence that Felix knew [the psychologist] would disclose his statements to [the girlfriend] or that he wanted them to be revealed . . . [and] [t]here is nothing in the record showing that [the psychologist] told Felix that he would contact her"].) Relying on *David L.*'s observation that " 'the specific intent element of the statute is implicated [when the threatening words are spoken to a third person and requires evidence the defendant] must necessarily have intended [the threat] to be conveyed' " (*Felix*, at p. 913, quoting *David L.*, *supra*, 234 Cal.App.3d at p. 1659), *Felix* concluded from the totality of the circumstances that the evidence was insufficient

to permit a reasonable inference the defendant intended his threat would instill fear in the victim. (*Felix*, at pp. 914-915.)

Similarly, in *In re Ryan D.* (2002) 100 Cal.App.4th 854 (*Ryan D.*), the minor was angry at officer MacPhail (who had cited the minor for possessing marijuana) and, one month later, painted a picture (depicting the minor shooting the officer in the back of the head) and turned it in as a high school art class project. The instructor took it to the assistant principal's office and, when the painting was later shown to the officer, MacPhail became concerned about her safety. The juvenile court found the minor made a criminal threat in violation of section 422. (*Ryan D.*, at p. 857.) The appellate court reversed, reasoning that although section 422 "does not require that a threat be personally communicated to the victim by the person who makes the threat [citing *David L.*, *supra*, 234 Cal.App.3d at p. 1659,] [n]evertheless, we emphasize that the statute 'was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others.' [Quoting *Felix*, *supra*, 92 Cal.App.4th at p. 913.] In other words, section 422 does not punish such things as 'mere angry utterances or ranting soliloquies, however violent.' (*People v. Teal*[, *supra*,] 61 Cal.App.4th 277, 281.) Accordingly, where the accused did not personally communicate a threat to the victim, *it must be shown that he specifically intended that the threat be conveyed to the victim.*" (*Ryan D.*, at p. 861.) The court then examined all of the circumstances and concluded the evidence was insufficient to prove that "the minor *intended* MacPhail to see the painting. After all, he did not display it to MacPhail or put it in a location where he knew she would see it. Nor did he

communicate with MacPhail in any manner to advise her that she should see the painting. Even MacPhail acknowledged that the students would not expect her to come into the art classroom. In fact, MacPhail did not learn of the painting until an assistant principal called and then showed it to her. As we have noted, to establish a criminal threat, it must be shown that, at the time the minor acted, he had the specific intent that Officer MacPhail would be shown the painting. [Citation.] Viewed in a light most favorable to the judgment, the totality of the circumstances establishes that the minor could have, and perhaps even should have, foreseen the possibility that MacPhail would learn of and observe the painting. But the evidence is not sufficient to establish that, at the time he acted, the minor harbored the specific intent that the painting would be displayed to MacPhail." (*Id.* at p. 864.)

The same rationale convinces us that Popescu's statements to Villareal cannot support the conviction. Both section 422 and section 646.9 are threat-related statutes that share a common specific intent element--the defendant intended the threat would instill fear in the victim--and therefore we conclude both statutes share the imbedded element that the defendant must specifically intend a threat made to third persons to be conveyed to the victim to instill that fear. In the present case, there was no evidence that would support an inference Popescu knew or expected, much less *intended*, his conversation with an employee of a federal agency (present to investigate a matter entirely unrelated to Popescu's dispute with Pagan) would be relayed to an *unrelated* employee of a *local* agency. For the same reasons articulated in *Felix* and *Ryan D.*, we conclude Popescu's

statement to Villareal does not supply sufficient evidence to support the "credible threat" element of section 646.9.

Moreover, even ignoring the absence of any evidence from which a rational jury could have concluded Popescu intended to instill fear in Pagan by his words to Villareal, we are also unconvinced the statement by Popescu to Villareal could qualify as a threat. Villareal's version of Popescu's statement was that Popescu (after complaining he had been unjustly ticketed by Pagan at some undisclosed time in the past) said "if I had seen [Pagan] writing that ticket, I *would have* shot him." Although there is sparse California authority examining the term "threat," courts in other jurisdictions appear to recognize that a threat must convey an intent to do harm *in the future*.⁵ For example, in *In re B.C.D.* (N.C. 2006) 629 S.E.2d 617, the minor was accused of violating a statute proscribing assaults or threats to assault another, and the court noted that "[i]n ordinary usage, a threat is defined as '[a] communicated intent to inflict harm or loss on another or another's property,' [(Black's Law Dict. (8th ed. 2004) p. 1519)], or '[a]n indication of an impending danger or harm [,]' [(Webster's II New College Dict. (3d ed. 2005) p. 1176)]. Thus, a threat constitutes an expressed intent to harm *at some point in the future*. Accordingly, the respondent could be adjudged delinquent for a violation of [the statute]

⁵ At trial, Popescu requested a pinpoint instruction to define the term "threat" to mean the declaration of an intention to inflict punishment, loss, or pain on another or to injure another by the commission of an unlawful act. Although Popescu's proposed definition was apparently drawn from *U.S. v. Daulong* (D.C. La. 1945) 60 F.Supp. 235, 236, and is consonant with California law (see *People v. Borrelli* (2000) 77 Cal.App.4th 703, 715 [a threat is an expression of an intent to inflict evil, injury, or damage on another]), the court declined Popescu's requested instruction.

if he communicated an intent to inflict bodily harm on Hall . . . *at some point in the future.*" (*In re B.C.D.*, at p. 619, italics added.) Similarly, in *U.S. v. Zavrel* (3d Cir. 2004) 384 F.3d 130, the court concluded the term "threat" connoted a statement or conduct that expresses an intention to inflict injury either imminently or in the future. (*Id.* at p. 136.)

Here, Popescu's statement to Villareal did not declare any present or future intention to harm Pagan, but instead stated what Popescu would have done in the past under a hypothetical set of circumstances. We do not believe that statement qualifies as a threat within the ambit of section 646.9.

Other Conduct toward Pagan

Although the prosecution's closing argument made Popescu's statement to Villareal the principal theme in its assertion that Popescu made the requisite credible threat toward Pagan, the prosecution also relied on Popescu's conduct toward Pagan to show he was impliedly threatening Pagan. The prosecution relied on the correspondence by Popescu, and the fact he went to Pagan's home in June of 2007, as conveying an implied threat toward Pagan.

However, the "John Wayne" postcard (sent in the fall of 2005) stated only that Pagan was incompetent and ignorant, and Popescu would not pay any tickets. Pagan conceded there was nothing threatening in that postcard. A second letter, not sent to Pagan but instead directed to the Parking Management Division written and dated May 18, 2007, stated only that Pagan was an "SOB dirty crook" and an atheist who selectively ticketed Popescu's car because it bore a "Save Our Cross" bumper sticker.

Pagan again conceded that nothing in that letter contained any threat. Pagan testified that a third letter, a "Happy Rosh Hashanah" card sent to his home in September 2007, concerned Pagan because it showed Popescu knew his home address, but Pagan conceded there was no threat contained in the text of the card.

The last two acts by Popescu relied on by the prosecution to prove he impliedly threatened Pagan with the intent to place him in reasonable fear for his safety were (1) a May 9, 2007, letter sent by Popescu to the city attorney defending the City and Pagan in the federal civil lawsuit filed by Popescu, and (2) Popescu's visit to Pagan's apartment. The letter, even assuming it was not constitutionally protected conduct,⁶ stated only that Pagan had objected to (and refused to answer) a question posed by Popescu's discovery in the civil lawsuit asking for Pagan's home address but that the objection was as a practical matter moot because "[Popescu] already know[s] where he lives." When the prosecutor asked if "there's no explicit threat in [this letter]?" Pagan only replied that he "took it as a

⁶ Section 646.9, subdivision (g), provides that, "[f]or the purposes of this section, 'credible threat' means a verbal or written threat . . . made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety Constitutionally protected activity is not included within the meaning of 'credible threat.' " Certainly, the letter sent by Popescu qualified for the absolute privilege under Civil Code section 47 (cf. *Izzi v. Rellas* (1980) 104 Cal.App.3d 254), and arguably fell within the ambit of conduct protected by the First Amendment. Additionally, the letter was not sent to Pagan, but was instead sent to the attorney who had directed Pagan not to answer the questions concerning his home address, and hence this letter raises analogous concerns over whether there is sufficient evidence to support the inference that Popescu *intended* this letter to instill fear in Pagan.

threat," with no explication of why he construed Popescu's letter as an implied threat.⁷

Although Pagan may legitimately have felt discomfited that his privacy had been compromised by Popescu's vexatious actions, the statute does not criminalize irksome conduct but instead imposes criminal penalties only when the harassing conduct is accompanied by a credible threat made with the intent to engender fear in the victim for the victim's or the victim's family's safety.

The final basis for the conviction was that Popescu visited Pagan's apartment. However, Popescu did not threaten or menace Pagan's wife, but instead offered a relatively benevolent pretext for the visit. Indeed, his behavior toward Pagan's wife was apparently so innocuous that she was not concerned with or frightened *by* Popescu's behavior during the visit, but instead became alarmed only *after* he had left and Pagan told his wife about Popescu. Although this visit was relevant to (and provided substantial evidence for) the first element of the section 646.9, subdivision (a), offense (of willfully or repeatedly following or maliciously harassing the victim), it adds nothing to whether Popescu made a credible *threat* with the intent of placing Pagan in reasonable fear for the safety of himself or his family.

Conclusion

We conclude there is insufficient evidence from which a rational trier of fact could have concluded Popescu, with the intent of instilling fear into Pagan, either expressly or

⁷ Pagan testified he saw Popescu's May 9, 2007, letter at the city attorney's office, but does not reveal *when* he saw that letter. Accordingly, we cannot determine whether Pagan may have possessed extraneous information that led him to believe Popescu's knowledge of his residence threatened his safety.

impliedly threatened Pagan. Accordingly, we reverse the judgment on count 1, and double jeopardy principles preclude retrial of that count.⁸ (*People v. Costa* (1991) 1 Cal.App.4th 1201, 1208.)

ANALYSIS OF CHALLENGE TO COUNT 3

Popescu also challenges the conviction on count 3, arguing the court's instruction on this count was erroneous and per se reversible.

A. Background

Popescu was charged in count 3 with illegal possession of a "billy" based on an expandable metal baton seized from Popescu's apartment that the police expert testified was the type of baton normally used by law enforcement and military personnel as an "impact weapon." At trial, the prosecution submitted an instruction on the charge of illegal possession of a "billy," which included a separate instruction to define a "billy" purportedly drawn from *People v. Mercer* (1995) 42 Cal.App.4th Supp.1 (*Mercer*). Popescu asserted it was illegal to possess a billy under section 12020, as construed by *Mercer*, only if he intended to use the item as a weapon at the time it was seized from him, and that he was neither carrying the baton nor intended to use it.

The court ultimately instructed that "[a] 'billy' includes a weapon such as a police officer's stick or club. A 'billy' includes a weapon commonly known as a collapsible or

⁸ Considering our conclusion, it is unnecessary to reach the other appellate claims raised to challenge the conviction on count 1. Additionally, because the court's sentence selected count 1 as the principal term, to which the other terms were either made subordinate or concurrent, it will be necessary to remand the matter for resentencing, which renders moot Popescu's challenge to the sentence.

expandable baton that is designed to extend for use as a striking weapon." Popescu argues the instruction was erroneous because (1) an expandable metal baton is only prohibited when a jury finds that the defendant was carrying the baton with the intent to use it as a weapon, and (2) the instruction was erroneous because it in effect directed a verdict on count 3.

B. Applicable Law

Section 12020 prohibits possession of "any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sap, or sandbag," subject to various exceptions not applicable here. In *Mercer*, the court noted section 12020 does not list a "baton," and therefore examined whether the item seized from the defendant was an "instrument or weapon of the kind commonly known as a . . . billy." (*People v. Mercer, supra*, 42 Cal.App.4th at p. Supp. 4, italics omitted.) *Mercer* noted that, in *People v. Grubb* (1965) 63 Cal.2d 614, the court determined section 12020 was not unconstitutionally vague and permissibly outlawed instruments other than those specifically enumerated in the statute. As explained in *Grubb*:

"Defendant complains that . . . the statute [is unconstitutionally vague] because a man of common intelligence cannot know if he violates its prohibition in view of its sweeping coverage. The contention runs that the term 'billy' encompasses such ordinary objects as an orthodox baseball bat, a table leg, or a piece of lumber; even though these objects find their most common use in a peaceful and traditionally acceptable way, all of them could be used as weapons of physical violence. [¶] We must construe the enactment, however, in the light of the legislative design and purpose. [Citations.] The Legislature obviously sought to condemn weapons common to the criminal's arsenal; it meant as well 'to outlaw instruments which are ordinarily used for criminal and unlawful

purposes.' [Citations.] . . . [¶] The terms of the statute gain content and definition by reference to this purpose. . . . The Legislature here sought to outlaw the classic instruments of violence and their homemade equivalents; the Legislature sought likewise to outlaw possession of the sometimes-useful object when the attendant circumstances, including the time, place, destination of the possessor, the alteration of the object from standard form, and other relevant facts indicated that the possessor would use the object for a dangerous, not harmless, purpose. [Citation.] [¶] Thus we hold that the statute embraces instruments other than those specially created or manufactured for criminal purposes; it specifically includes those objects 'of the *kind* commonly known as a billy.' [Citation.] The concomitant circumstances may well proclaim the danger of even the innocent-appearing utensil. The Legislature thus decrees as criminal the possession of ordinarily harmless objects when the circumstances of possession demonstrate an immediate atmosphere of danger. Accordingly the statute would encompass the possession of a table leg, in one sense an obviously useful item, when it is detached from the table and carried at night in a 'tough' neighborhood to the scene of a riot. On the other hand the section would not penalize the Little Leaguer at bat in a baseball game." (*Id.* at 619-621, fns. omitted.)

As *Mercer* also noted, in *People v. Canales* (1936) 12 Cal.App.2d 215, the court (upholding a conviction of possessing "a black jack or billy") explained the "definition [(i.e., instruments 'of the kind commonly known as a . . . billy')]" is purposely broad, for . . . the [L]egislature did not prohibit the possession of a blackjack as such or a billy as such as it might have done, but instead and very likely with appreciation of the difficulties of nomenclature, forbade ownership of any weapon of that *class*; the purpose being to outlaw instruments . . . ordinarily used for criminal and unlawful purposes." (*Canales*, at p. 217.)

In *Mercer*, the court applied *Grubb* and *Canales* to an item described as a collapsible baton where the evidence was that the baton was " 'used for the same purpose

[as a billy] which is a striking motion.' " (*Mercer, supra*, 42 Cal.App.4th at p. Supp. 5.) Although the *Mercer* defendant claimed the baton was a truck antenna, the arresting officer's report stated that when he saw the object he " 'immediately recognized it as a weapon commonly known as a [collapsible] baton. The weapon, when extended by a flick of the wrist, is extended and used as a club. [¶] I have seen this weapon on several occasions and it is used by police and martial [artists] as an offensive weapon used to strike.' " (*Ibid.*) *Mercer* concluded that, "[u]nder the above authorities, possession of such an item is proscribed by section 12020, subdivision (a)." (*Ibid.*) Indeed, *Mercer* noted numerous other provisions of the Dangerous Weapon Control Law (§ 12000 et seq.) confirmed its interpretation that a baton used for striking purposes was the type of instrument falling within the purview of the prohibitions against "billys." (*Mercer*, at p. Supp. 6.)

For example, section 12002, subdivision (a), provides: "Nothing in this chapter prohibits police officers, special police officers, peace officers, or law enforcement officers from carrying any wooden club, *baton*, or any equipment authorized for the enforcement of law or ordinance in any city or county." (Italics added.) In addition, section 12020, subdivision (b)(14), provides that subdivision (a) does not apply to "[t]he manufacture for, sale to, exposing or keeping for sale to, importation of, or lending of wooden clubs or *batons* to special police officers or uniformed security guards authorized to carry any wooden club or *baton* . . . by entities that are in the business of selling wooden *batons* or clubs to special police officers and uniformed security guards when

engaging in transactions with those persons." (Italics added.) Finally, *Mercer* quoted an Attorney General opinion: " '[a]lthough section 12020(a) does not prohibit the possession of a policeman's baton as such, *it is an "instrument or weapon of the kind" or class commonly known as a billy club or blackjack and falls within the proscription.*' " (*Mercer, supra*, 42 Cal.App.4th at p. Supp. 6, quoting 65 Ops.Cal.Atty.Gen. 120, 121 (1982), italics added.)

Mercer went on to state that, under *Grubb*, a court may also consider the surrounding circumstances, such as the time, place, destination of the possessor, the alteration of the object from standard form, and other relevant facts to show the possessor intended to use the object for a dangerous purpose. In *Mercer*, the police report showed the defendant was apprehended while apparently leaving the scene of a burglary, and a pat-down search for weapons discovered the collapsible baton. *Mercer* stated, "even assuming *arguendo* that the instrument found on appellant's person was not initially meant to be a weapon, the attendant circumstances indicate that the item was to be used as a weapon at the time of arrest." (*Mercer, supra*, 42 Cal.App.4th at p. Supp. 6.)

C. Analysis

We are convinced the court's instruction defining a "billy" was correct under *Mercer* and *Grubb*. The *Grubb* court construed section 12020 as intended *both* to "outlaw the classic instruments of violence and their homemade equivalents" *and* "to outlaw possession of the sometimes-useful object *when the attendant circumstances . . .* indicated that the possessor would use the object for a dangerous, not harmless, purpose."

(*People v. Grubb*, *supra*, 63 Cal.2d at pp. 620-621, fn. omitted.) *Mercer* applied *Grubb*'s approach to a collapsible baton, and concluded the baton fell under the former category. Although *Mercer* also employed the latter test to buttress its conclusion that the conviction was proper, *Mercer* did not hold that this test must be employed when the weapon is *designed* for use as a striking weapon but is not enumerated in section 12020. To the contrary, *Grubb* appears to apply the latter test only when there is some evidence that the instrument seized "find[s] [its] most common use in a peaceful and traditionally acceptable way, [but] could be used as [a weapon] of physical violence." (*Grubb*, at pp. 619-620.)

Here, the only evidence on the character of the collapsible metal baton found in Popescu's apartment was that it was designed to be carried and used as an "impact weapon" by law enforcement and military personnel, and Popescu cites no evidence the baton's "most common use [is] in a peaceful and traditionally acceptable way" (*People v. Grubb*, *supra*, 63 Cal.2d at pp. 619-620) by civilians. Accordingly, the court had no sua sponte obligation to instruct the jury that it was required to assess the surrounding circumstances to determine the baton was to be used as a weapon at the time it was seized.

Popescu also complains the instruction was erroneous because it in effect directed a verdict on count 3 by instructing that a " 'billy' includes a weapon commonly known as a collapsible or expandable baton that is designed to extend for use as a striking weapon." However, the instruction did not state that the instrument seized *was* a "billy" but only

stated that, if a collapsible or expandable baton is "*designed . . . for use as a striking weapon*," the baton fell within the definition of a billy. The instruction left to the jury the decision on the factual question of whether to credit the expert's testimony that *this* baton was designed to use as a striking weapon, and was therefore proper. (Cf. *People v. Canales, supra*, 12 Cal.App.2d at p. 218.) Accordingly, we reject Popescu's claim that the instruction improperly directed a verdict on count 3.

DISPOSITION

The conviction on count 1 is reversed; in all other respects, the convictions are affirmed. The matter is remanded for resentencing.

McDONALD, Acting P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.